Sears, Roebuck *and* Company *and* John R. Iaci *and* Corliss L. Hepburn. Cases 12–CA–19317 and 12–CA–19533

April 19, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On November 24, 2000, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has considered the decision[*] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

In her decision, the judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee John Iaci. For the following reasons, we agree with the judge.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

In determining whether the General Counsel has met his initial burden of proving that an employee's protected activity was a motivating factor in an employer's decision to discharge the employee, the Board has held that

> [t]he motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [*Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992) (citations omitted).]

Further, the Board has found that "evidence of a 'blatant disparity is sufficient to support a prima facie case of discrimination.'" *New Otani Hotel & Garden*, 325 NLRB 928 fn. 2 (1998), quoting *Fluor Daniel*, 304 NLRB at 970–970. In addition, "[t]iming alone may suggest anti-union animus as a motivating factor in an employer's action." *Masland Industries*, 311 NLRB 184, 197 (1993), quoting *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

Applying these principles to the facts of this case, we find, based on the record as a whole, that the General Counsel has established that Iaci's union activity was a motivating factor in his discharge. Iaci worked for the Respondent for 31 years as a service technician and was the most senior employee in his division at the West Palm Beach facility. As a service technician, Iaci's duties consisted of performing repair work on appliances at customers' homes. His personnel record showed that he received satisfactory or better performance evaluations and had a number of customer commendations for his work. In February 1997, Iaci received a disciplinary "last chance" warning for recording as a "completed call" a service call that the customer had canceled when Iaci made his preliminary telephone call to the customer.

In early 1997,[3] the Union began an organizing campaign and Iaci engaged in union activities.[4] Iaci spoke to employees about the Union and collected signed authorization cards in the Respondent's parking facility sometime between May and June. In June, former District Service Manager Ron Medford had a discussion with Iaci

[*] In various places in her decision, the judge erroneously referred to employee John Iaci as "John Iace." We correct the misspelling wherever it appears.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's finding in sec. II,A,6, par. 4 of her decision that as District Service Manager Ralph Graettinger escorted employee Corliss Hepburn to the door after her discharge, he did not reply to her comment that she was terminated because of her union activity. Although the record shows that Graettinger did, in fact, respond to and deny Hepburn's comment, the judge's inadvertent error does not affect our decision to adopt the judge's conclusion that the Respondent discharged Hepburn in violation of Sec. 8(a)(3) and (1) of the Act.

[2] We shall modify the judge's recommended Order and notice to correct inadvertent errors, and to conform to our recent decision in *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001).

We will substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

[3] All dates are in 1997, unless stated otherwise.

[4] A representation election was conducted at the Respondent's Plantation and West Palm Beach facilities on February 28, 1998.

in the parking lot and informed him that the Respondent did not want a "third party" at the West Palm Beach facility. Medford also asked if the "third party" would go away if Christine Smith, Iaci's supervisor, were transferred to another facility.[5] Iaci replied that he did not know, but it would not hurt.

In early August, District Service Manager Ralph Graettinger arrived at the West Palm Beach facility to replace Medford. A few weeks after his arrival, Graettinger met with Iaci to discuss work-related issues. During the meeting, Graettinger informed Iaci, among other things, that he had a bad attitude, was too opinionated, was a bad influence on other employees, and that he said things that other employees should not hear. Iaci told Graettinger that he was trying to straighten out some of the problems at work and that he was upset about the Union. Graettinger told Iaci that Smith was not going to be transferred from the West Palm Beach facility.

After meeting with Iaci, Graettinger instructed Smith to monitor Iaci's duties and make a list of his work infractions. In mid-September, Graettinger reviewed Smith's report and determined, without speaking to Iaci, that Iaci's alleged work infractions needed to be investigated by a member of the Respondent's "Asset Protection" security division.[6] On October 2, Theft Investigator Richard Gonzalez met with Iaci. According to Iaci's credited testimony, Gonzalez told Iaci that he would not be fired if he answered Gonzalez's questions. Gonzalez also insisted that Iaci add sentences to his written statement that supported the Respondent's claim that Iaci allegedly violated the Respondent's policies. After the interview, Graettinger reviewed Iaci's statement and then terminated him for allegedly falsifying his production records and violating the Respondent's policies.

In its exceptions, the Respondent contends that the judge erred in finding that the General Counsel met his initial burden of establishing that Iaci's union activity was a motivating factor in his discharge. The Respondent argues that the record does not support a finding that the Respondent had knowledge of Iaci's union activity or that the Respondent had antiunion animus. We agree with the judge that the General Counsel met his burden of showing that union activity was a motivating factor in Iaci's discharge.

First, there is no dispute that Iaci was engaged in union activities. Iaci distributed union authorization cards to employees in the Respondent's parking lot and discussed the Union with other employees.

Second, we find, contrary to the Respondent's argument, that the record contains ample evidence of employer knowledge of Iaci's union activity. The judge credited Iaci's testimony concerning conversations with District Service Managers Medford and Graettinger in June and August, respectively. In the June conversation, Iaci was asked whether the "third party" "would go away" if Supervisor Smith were transferred. The term "third party" clearly referred to the Union. Thus, it is evident that the Respondent was aware at that time that Iaci was involved with the Union. Graettinger's reference in the August conversation to the Respondent's decision not to transfer Smith indicates that Graettinger was aware of the content of Iaci's June conversation with Medford. In addition, Iaci specifically mentioned the Union in the August conversation. The judge discredited Graettinger's denial that he knew about Iaci's union activities. We find the record sufficient to support a finding that the Respondent had knowledge of Iaci's union support and activities.

Third, we find, contrary to the Respondent's contention, that the record as a whole is sufficient to support an inference of animus. As set forth above, the Board may infer animus "from the total circumstances proved." *Fluor Daniel*, supra. In finding that the record supports an inference of animus, we rely on the timing of Iaci's discharge and the "blatant disparity"[7] between the treatment of Iaci and that of other employees who engaged in similar work infractions.[8]

The record shows that after Iaci received a disciplinary warning in February, Smith did not have any major concerns with Iaci's work during the several months prior to August. However, after Graettinger met with Iaci in mid-August and criticized him for being a bad influence on the other employees and saying things that they should not hear, Iaci's work was subjected to a closer scrutiny than that of the other service technicians.

At Graettinger's instruction, Smith compiled a list of the mistakes that Iaci made at work. The credited testimony shows that Iaci's alleged errors, such as changing warranty dates on appliances or selling maintenance agreements on customers' appliances, were common practices for the service technicians. Smith also testified that the other service technicians that she supervised engaged in the same practices for which Iaci was disciplined, but that she did not examine their work as closely as Iaci's work.

In its exceptions, the Respondent claims that Iaci's February warning rather than his union activity necessi-

[5] We agree with the judge that Medford's use of the term "third party" was a reference to the Union.

[6] Iaci's alleged work infractions were: (1) changing warranty dates on appliances; (2) selling maintenance agreements to customers and performing service checks on that basis; and (3) performing service checks on customers' second appliances at the time of a service call on another appliance.

[7] *Fluor Daniel*, supra.

[8] In addition, we agree with the judge that Medford's questioning of Iaci as to what steps the Respondent might take in order to make the Union "go away" shows antiunion animus. See, e.g. *Tower Records*, 182 NLRB 382, 387 (1970) (unlawful for employer to confer benefits on employees designed to influence them to reject union representation), enfd. 79 LRRM 2736 (9th Cir. 1972).

tated its closer scrutiny of his work. We disagree. The evidence shows that Iaci's work was not subjected to closer scrutiny until August, and that neither Smith nor any other manager had a problem with Iaci's work from April to July. To the contrary, Smith commended Iaci's work, as reflected in her comments of "impressive" and "great job" on her evaluations of his work.

In addition, the Respondent failed to follow its practice of discussing the alleged work infractions with Iaci prior to his discharge and treated Iaci differently from other employees who committed similar work infractions. The record shows that about once a month Smith met individually with the service technicians to review their work and any errors that she noticed were consistent problems. Before the August discussion with Graettinger, Smith did not inform Iaci of any major work discrepancies. After the August discussion between Graettinger and Iaci, Smith kept track of Iaci's work and made a list of his work infractions, but failed to talk to Iaci about any of his errors prior to giving her report to Graettinger. In early September, after Iaci heard rumors that he would be fired, Smith and Support Manager Horacio Villazon assured Iaci that he was not going to be terminated. At no time did any supervisor, including Graettinger, question Iaci about his work infractions prior to his interview with Investigator Gonzalez from the Respondent's security division.

We find that the Respondent also failed to establish that it used theft investigators in cases other than those where employees were accused of stealing money or appliances from the Respondent. No evidence was presented that theft investigators had been previously used to question employees for the work infractions allegedly engaged in by Iaci such as changing warranty dates, selling maintenance agreements, or performing service checks on customers' second appliances at the time of service on another appliance. The Respondent also did not show that other service technicians received discipline or were discharged for similar infractions.

These circumstances, including timing and disparate treatment, support a finding of animus. Thus, the record as a whole supports the judge's finding that the General Counsel has met his initial *Wright Line* burden of showing that Iaci's union activities were a motivating factor in the Respondent's decision to discharge him. Therefore, the burden shifts to the Respondent to establish that Iaci would have been discharged even absent his union activities. The judge found that the Respondent failed to meet this burden. For the reasons set forth by the judge, we agree. We find that the Respondent's reasons for discharging Iaci were pretextual. Accordingly, we find, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) by discharging Iaci.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sears, Roebuck and Company, West Palm Beach and Plantation, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 19, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Chose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate employees because of their union or protected concerted activities.

WE WILL NOT any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Iaci, Corliss Hepburn, and Cordy Richardson full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Iaci, Corliss Hepburn, and Cordy Richardson whole for any loss of earnings and other benefits resulting from their discharges, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of John Iaci, Corliss Hepburn, and Cordy Richardson, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

SEARS, ROEBUCK AND COMPANY

Jennifer Burgess-Solomon, Esq., for the General Counsel.
Richard Pincus, Esq. and *Tamra Domeyer, Esq. (Fox and Grove),* for the Respondent.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on 7 days in February and March 2000, in Miami, Florida. The complaint alleges Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employees John Iaci, Corliss Hepburn, and Cordy Richardson. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a New York corporation with offices and places of businessthroughout the United States, where it is engaged in the operation of department stores and service operations. The two locations involved in this matter, those in West Palm Beach and Plantation, Florida, are service operations. During a representative 1-year period, Respondent purchased and received at these locations goods valued in excess of $50,000 directly from points outside Florida. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, International Brotherhood of Electrical Workers, Local Union 349, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Background

On February 27, 1998, a representation election was conducted among the employees of Respondent's two facilities at Plantation and West Palm Beach. For about a year preceding the election, certain of Respondent's employees were active in attempting to organize the employees in support of the Union. Primary among these was Joe Fowler, a service technician at Plantation with more than 25 years of employment at Respondent. Fowler retired from Respondent in May 1997, but continued to spearhead the organizational drive after his retirement. Fowler testified that John Iace was the most active union adherent at West Palm Beach and was responsible for collecting most of the signed union authorization cards at that facility after May 1997.

Iace testified that he talked with employees and got authorization cards signed in the parking lot outside the West Palm Beach facility. He also stated that in June 1997, then-District Manager Medford talked with him in the parking lot. According to Iace, the two discussed the Union, why some employees were permitted to drive their service trucks home, and Christine Smith's supervision. Medford told Iace that the Company and the employees don not need a third party. Medford also asked Iace if it would "make the third party go away" if he were to transfer Christine Smith to a different location. Iace said that he did not know, but it wouldn't hurt. Iace's testimony regarding this conversation was uncontradicted.

Fowler also testified that Corliss Hepburn and Cordy Richardson were the two people he relied on most to collect authorization cards and information at Plantation after he retired. Employees did not wear pins or other insignia denoting their sentiments regarding the Union during the campaign. According to Richardson's testimony, he collected about 15 or 20 authorization cards between mid-1997 through the election in February 1998, and made home visits during that time. Several witnesses testified that it was undisputed that Richardson regularly ate lunch at Sonny's Barbeque with Fowler and several other employees. At one time in March 1997, Supervisor Pat McLaughlin went to a parking lot adjacent to Sonny's Barbeque, accompanied by employee James Easy. McLaughlin watched the restaurant with binoculars to see who was at the restaurant. Respondent's asserted reason for this surveillance was to make sure the employees were not overstaying their 1-hour lunchbreak.

As both she and Joe Fowler testified, Corliss Hepburn also actively collected authorization cards during the union campaign. She estimated that she collected about 25 or 30 cards. Joe Fowler testified that a few weeks before the election, he drafted a letter to employees which he distributed as a flyer. The letter purported to be written by an unnamed current employee. As he had been retired for about 9 months, the letter contained information he got from current employees, most notably, from Corliss Hepburn. This letter was widely circulated at Plantation in mid-February. Sandra Smith[1] testified

[1] Sandra Smith was alleged to be a supervisor in February 1998, and through May 1998, when she left Respondent, but this status was not admitted by Respondent. Her title was lead in the audit and data entry department, and she voted without challenge in the election. Based on Sandra Smith's uncontradicted testimony that she assigned work to the

that she believed at the time that Corliss Hepburn was the author of the letter, and that she believed this opinion was widespread throughout Plantation.

During the latter stages of the representation campaign, Respondent conducted a number of meetings with its employees, in which certain management representatives expressed Respondent's opposition to the Union. Several witnesses testified concerning a meeting at Plantation in mid-February 1998, at which a number of employees were addressed by Charlie Young, a manager from Respondent's human resources department. Employees Joe Hofer, Hepburn, and Richardson testified that all the employees at this particular meeting were union supporters. At the meeting, Charlie Young made a comment which implied the assembled employees were union supporters. He asked that they give the Company a chance. Corliss Hepburn spoke up and stated the employees had already done so, and the Company had not lived up to its statements. Cordy Richardson spoke or nodded his agreement with Hepburn's remarks. The testimony of the employees concerning this meeting was uncontradicted, as Young, who is still in Respondent's employ, was not called to testify by Respondent.

2. John Iace

Iace had worked for Respondent for 31 years, and was the most senior service technician at the West Palm Beach facility. He worked in a section which repaired washers, dryers, and microwave ovens. His long employment history contained satisfactory or better performance evaluations, as well as many instances of commendations for high productivity and sales of maintenance agreements (appliance extended service contracts). His employment file also contains a record of numerous customer commendations for the 2 years prior to his discharge.

Respondent's service technicians called on customers in their homes, where they performed repair work. They ordinarily received job assignments in the mornings, at which time they would telephone the customers to find out, if possible, what might be wrong with the appliance, so that they could put needed replacement parts on their trucks. Each job was called a "service order" and was recorded in a computerized system. Each technician carried a computer "hand-held terminal" or HHT on which the orders were shown, and on which the service technician could record the repair he made and other information. Service calls were generally of three types: a repair covered by the original warranty, a repair covered by an extended service contract (called "maintenance agreements" by Respondent), or a cash service call. If a customer, after being given an estimate of the cost of a repair, chose not to have the repair performed, there was a fixed service charge, also called a "declined estimate."

There was testimony from several service technicians that it was not uncommon for them to change warranty dates on appliances. This was done for several reasons. One example is the case of an appliance which was purchased by a contractor, installed in a new or renovated home, and not actually put into service until some months after the purchase. In that case, the effective warranty date would be the date the consumer began to use the appliance. There was also evidence that a service technician would use the warranty date reported to him by the customer. It was not considered appropriate for the service technician to get into an argument with a customer over a warranty date. There is evidence that service technicians had been told by their supervisors to check the warranty date more carefully, when they had mistakenly repaired an appliance as "under warranty," but no other discipline for this error was shown by the evidence.

There was no dispute that the service technicians were strongly urged by Respondent to make as many "completed calls" as possible, and were also encouraged to sell maintenance agreements on customers' appliances. According to Joe Fowler and Joe Hofer, two longtime employees who had retired by the time of the trial, it was commonplace for a service technician to suggest to a customer that he check any other appliances, while he was there to service one appliance. For a customer who had warranties or maintenance agreements on her appliances, there would be no charge, and the service technician would thereby show another completed service call on his daily schedule. Both these witnesses testified that there were occasions when they simply went ahead and checked over the other appliance, whether the customer specifically requested this or not.

In February 1997, Iace had received a disciplinary warning for recording as a "completed call" a service call which had been canceled by the customer when he made his preliminary telephone call to her in the morning. Christine Smith testified that she had no problems with Iace during the several months prior to August 1997. In fact, his personnel record reveals her written comments of "impressive," "fantastic," and "great job" for this period.

Ralph Graettinger arrived at West Palm Beach in early August 1997 to replace Medford as district service manager. He testified that he did not speak directly with Medford before replacing him.

In mid-August 1997, within a few weeks of Graettinger's arrival, Iace spoke with him in the parking lot, raising an issue involving the service trucks as well as Respondent's incentive award policy. Graettinger said that he would get back to Iace. A few days later, Graettinger spoke with Iace. According to Iace, Graettinger told Iace that he had a bad attitude, was too opinionated, was a bad influence on other employees, and was saying things the other employees should not be hearing. Iace said that he was trying to straighten out some of the problems at work, and that he was upset about the Union. He also told Iace that Christine Smith was not going to be transferred.

At about the same time, on Graettinger's instructions, Christine Smith made a list of mistakes she believed Iace had made in his work. This list included the three alleged errors on which Graettinger testified that he relied in deciding to discharge Iace, his performing a check on a second appliance at the time of a service call on one appliance, his changing a warranty date, and his selling of a maintenance agreement and performance of a check on that basis. On cross-examination, Christine Smith admitted that other service technicians had engaged in the same practices which she believed Iace had engaged in. She also admitted that she did not check up on the other service technicians as closely as she did Iace.

Despite these actions, when Iace, who had heard some rumors to the effect that he was in danger of being fired, asked Christine Smith about this in early September, Smith assured

three employees in her department, approved overtime and leave, interviewed and effectively recommended employees for hire, evaluated employees, approved timecards, and counseled or disciplined employees, I find that she was a supervisor within the meaning of Sec. 2(11) and an agent within the meaning of Sec. 2(13) of the Act.

him that he was not about to be terminated, as did Horacio Villazon, the support manager and Smith's superior.

3. Investigation

Graettinger did not deal with Christine Smith's list until mid-September, when he returned from a personal leave. After reading Christine Smith's memo, and without speaking with Iace about the alleged problems, he immediately sought permission to fire Iace. Graettinger did not investigate any of Christine Smith's notations, nor did he ever talk with Iace about them. There is no evidence that he investigated the extent to which other employees engaged in identical practices without penalty. Instead, he contacted "Asset Protection," the part of Respondent's security division concerned with stealing, whether by customers or employees. An interviewer from this division, Richard Gonzales, who admittedly did not know anything about a service technician's job, interviewed Iace on October 2, 1997.

Iace testified that Gonzalez talked with him and asked him questions for nearly an hour, and essentially dictated statements for Iace to write on a "statement." According to Iace, he asked Gonzalez the purpose of the interview and whether he was going to be fired. Gonzalez told Iace that he would not fire him, and that if he answered the questions there would be no problem. Iace told Gonzalez that he had tried to satisfy the customer in the change of warranty date, and that he had done checks on the second appliance. Gonzalez insisted that Iace add the last two sentences to his "statement." Gonzalez could recall little of his interview with Iace, but denied that he had insisted on certain of the sentences being written. For the reasons detailed below, I do not credit Gonzalez in any respect, where his testimony conflicts with that of any other witness.

After the interview, according to Graettinger, he asked Iace if he had written and signed the document Gonzales had handed him. When Iace said that he had, Graettinger immediately told Iace that he was fired.

4. Customer satisfaction policy

Respondent's service operations had initiated a "customer satisfaction policy" some years before the events herein. The then-district manager informed the employees that they were "empowered" to satisfy the customer, and to do "whatever it took" to satisfy the customer, even up to $5000 worth of repair costs.[2] Former Supervisor James Easy testified that service technicians were encouraged to use the policy themselves, on their own initiative, as the supervisor or other manager would in all likelihood have to deal with the customer's problem if the service technician did not take care of it. Retired employees Joe Hofer and Joe Fowler corroborated Easy on this point. Both Corliss Hepburn and Cordy Richardson were aware of Respondent's customer satisfaction policy, and had used it in the past in the course of their work, replacing a part or an appliance for a customer. Richardson testified that no supervisor had ever said anything to him about his use of the customer satisfaction policy. Hepburn recalled that she had used the policy to replace a vacuum cleaner which broke repeatedly. The customer who owned the vacuum cleaner happened to be an employee as well. Hepburn was not told on this occasion or any other that she had applied the customer satisfaction policy inappropriately. Sandra Smith testified without contradiction that in 1995 an employee named Adams had mistakenly performed a $500 repair as a no-cost "warranty" service call instead of charging the customer for the repair. According to her testimony, the employee was simply told by his supervisor to be more careful in the future.

5. Corliss Hepburn and Cordy Richardson

Cordy Richardson had been a service technician for Respondent for about 24 years at the time of his discharge on March 6, 1998. He worked under the supervision of Pat McLaughlin at Plantation, where he repaired refrigerators. Richardson had no written discipline in his personnel file, but he did have several notations regarding customers having complimented his service work. As described above, from mid-1997 through the election in February 1998, Richardson's activity in aid of the union campaign involved making home visits and soliciting authorization cards.

Corliss Hepburn had been employed by Respondent for about 14 years. At the time of her discharge on March 6, 1998, she was a service technician who repaired sewing machines and vacuum deaners. Hepburn likewise had a clean disciplinary record, and had won an "excellence award" in 1997 for her productivity. Her supervisor was Ron Reeves. As described above, Hepburn was also active in the union campaign, soliciting signatures on authorization cards which she returned to Joe Fowler, and speaking out in a way which indicated dissatisfaction with the employees' unrepresented status to a company representative at one of Respondent's meetings held during the representation campaign.

In mid-February 1998, on one of her days off, Hepburn called the service center to request a repair to her refrigerator. Hepburn testified that she purchased all her appliances from Respondent, and that whenever she needed a repair, she would behave like any other customer and request a service technician. Because she knew the reputations of various service technicians, she requested Richardson by name. In the past, she had requested a different service technician by name. Several witnesses in addition to Hepburn testified that employees who were also Sears appliance owners were treated the same as any other customer, and that it was not uncommon for customers (whether employees or nonemployees), to request a particular service technician by name.

Hepburn requested Richardson because she trusted his work. Before setting out that morning, Richardson contacted the customers for whom he had service orders, including Hepburn. Richardson testified that she told him that her refrigerator was not cooling. Based on that fact, he surmised that the compressor was not working, and he loaded a compressor on his truck. Richardson testified that although Hepburn's refrigerator bore Respondent's store brand, Kenmore, it had been manufactured by General Electric (GE). The service technicians who dealt with refrigerators had been having significant problems with

[2] In finding that the announced limitation on the policy was $5000, I have credited witnesses Corliss Hepburn, Cordy Richardson, Joe Hofer, James Easy, and Sandra Smith, all of whom recalled this figure. Easy and Sandra Smith were particularly worthy of credit. Easy, a current employee of 30 years tenure, was a neutral witness who testified in an impressive and straightforward manner. Sandra Smith displayed a remarkably detailed and accurate recollection throughout her testimony. Contrary to Respondent's position, I could find no indication of bias in Sandra Smith's detailed testimony. I credit her testimony fully. Other witnesses were either unaware of the limitation, or had their own personal limitation. Retired Supervisor Ron Reeves believed service technicians could do repairs without charge in order to satisfy the customer up to $1000. Only Supervisor Pat McLaughlin testified that the limitation was $100. I specifically discredit him on this point.

many of the GE refrigerators manufactured within a recent time period. The compressors developed what the service technicians called a "black powder" problem, which caused the compressor to cease functioning. On examining the refrigerator, Richardson testified that he concluded that the compressor needed replacing, and assumed that it was probably the "black powder" problem so common with GE refrigerators of the approximate vintage of Hepburn's. According to the computer record on Richardson's HHT, she had purchased the refrigerator in 1992. This meant that the refrigerator was more than 5 years old. While the normal warranty period for a compressor is 5 years, there was evidence that in some cases, as with a particular Whirlpool refrigerator, the warranty would be extended for an extra year, or some other accommodation would be made when the item breaks in what would be considered an abnormally short period of time. This was particularly true when an appliance had been determined to have a manufacturer's defect, such as the various GE models of approximately the same vintage as Hepburn's. In fact, a "Service Flash" had been issued some years earlier by Respondent concerning the GE models which were affected by the "black powder" problem, and listing some 24 model numbers. It turned out that Hepburn's refrigerator was not 1 of the 24 models listed, but it was of a similar age and type, and Richardson believed it to be one of the models with the "black powder" problem. The particular accommodation described in this service flash was a decreasing scale of discount through the 10th year of the appliance's life. Richardson did not carry the service flashes with him in his truck, nor was he required to, according to the record evidence. Richardson testified that, based on his experience, he assumed Hepburn's was the same type of refrigerator which was subject to this problem and so some accommodation was due to the customer. He therefore coded the service call as a "customer satisfaction" call. Such a call must be "charged back" for accounting purposes either to the manufacturer, a retail store, or the service center. Richardson charged back the call to the retail store which he believed was the purchase location of the appliance.

Richardson replaced the compressor and told Hepburn's husband that there would be no charge for the repair, that it was covered because it was a manufacturing defect. Richardson coded his service call on the HHT with the numerical codes which represented the customer satisfaction policy and a charge-back to the store from which it was purchased. Hepburn stated that she did not know how Richardson coded the repair, as she was in another room sewing while he repaired the refrigerator.

6. Investigation

Sandra Smith testified that one of her audit employees, in going over all the service calls, found that the service call had been charged to the wrong retail store, and brought it to Sandra Smith's attention. She passed the information on the Horacio Villazon, support manager. Pat McLaughlin, as a supervisor, customarily reviews his service technicians' daily work on the computer. He noted the customer satisfaction code on Richardson's work schedule and, with Villazon, reported it to Graettinger. Neither Villazon nor McLaughlin had any part in the decision to discharge the two employees. Graettinger testified that he immediately assumed Richardson and Hepburn were scheming to get a "free" compressor from Respondent, and sought permission to discharge them. Graettinger claims that he got permission from his superiors to do so, as he was required to do with employees of their long tenure, but that this permission was conditional on his suspicions or preconceived conclusions being proved correct. Graettinger, however, never investigated what had occurred, nor did he interview either Hepburn or Richardson, nor did he find out anything about the customer satisfaction policy, and how it was normally used. He made no inquiry as to whether the code was an error or as to whether it was a proper or improper application of the customer satisfaction policy.

Nothing was said to either employee, nor were they questioned about it by their direct supervisors or any other supervisors or managers in Plantation. Instead, on March 6, 1998, Richardson was interviewed by Gonzalez, the "Asset Protection" specialist, and wrote a short statement which Richardson testified was virtually dictated to him by Gonzalez. Although Gonzalez assured Richardson that his "mistake" was not serious and the purpose of the interview was a "slap on the wrist," Richardson was immediately discharged by Graettinger. A short time later on the same day, Hepburn, unaware of this series of events, was also interviewed by Gonzalez. She too testified that Gonzalez essentially told her what she was to write on her "statement." After the interview, she was immediately discharged by Graettinger.

Gonzalez denied dictating to the employees what to write, but his testimony demonstrated so little recollection of the specific interviews with the three employees involved herein that he did not recall the answers to many, many questions. When he did testify about the interviews, the manner and wording of his testimony showed that he was testifying more about what his habitual practice is when interviewing employees rather than from any specific recall of these three interviews. In addition, the statements of Hepburn and Richardson both contain similar sentences, a fact which supports their testimony that they were being told what to write by the interviewer. Gonzalez' memory, manner of testifying, and demeanor were entirely unconvincing, and I do not credit his testimony in any respect where it conflicts with the testimony of other witnesses.

According to Hepburn's testimony, as Graettinger escorted her to the door after discharging her, she remarked, this is because of the Union, isn't it? Graettinger did not answer, but smiled at Hepburn.

B. Discussion and Analysis

1. Applicable case law

In order to prove that a respondent discharged an employee in violation of Section 8(a)(1) or (3) of the Act, the General Counsel must prove the employee engaged in union or other concerted protected activities, the respondent knew of these activities, the respondent was hostile toward the union and/or these activities, and that the discharge was carried out because of the activities. If the General Counsel proves all these elements, the respondent may defend by proving that it would have discharged the employee for other reasons in any case, even in the absence of the employee's union or protected concerted activities. The General Counsel may rebut the respondent's defense; if the General Counsel does so successfully, the prima facie case stands, and the violation is established. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Some indicia of pretext, that is, factors which the Board has relied on in finding that the General Counsel has successfully rebutted the respondent's *Wright Line* defenses, are: (1) dispar-

ity in the respondent's treatment of the discriminatee as opposed to its treatment of other employees; (2) the respondent's assertion of "bad attitude," by which is meant protected activities; (3) the respondent's failure to follow its own policies; (4) the satisfactory work record of the employee; and (5) the respondent's failure to investigate the alleged problem or its conduct of a sham investigation. See, e.g., *NLRB v. Delta Gas, Inc.*, 840 F.2d 309 (5th Cir. 1988); *Safety Kleen Oil Services*, 308 NLRB 208, 210 (1992); *Bon Marche*, 308 NLRB 184, 198 (1992); *WordsWorth*, 307 NLRB 372, 375 (1992); *Soltech, Inc.*, 306 NLRB 269, 278–279 (1992); *Lear-Siegler Management Service*, 306 NLRB 393, 405–406 (1992); *T.M.I.*, 306 NLRB 499, 504 (1992); *Emergency One, Inc.*, 306 NLRB 800, 808 (1992); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Kunja Knitting Mills U.S.A.*, 302 NLRB 545, 560–561 (1991); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1048–1049 (1991); *Fort Wayne Foundry Corp.*, 296 NLRB 127, 131 (1989); *Active Transportation*, 296 NLRB 431 (1989); *Superior Coal Co.*, 295 NLRB 439, 450, 453 (1989); *Jumbo Produce*, 294 NLRB 998, 1006 (1989); *NKC of America*, 291 NLRB 683, 684 (1988); *McCotter Motors Co.*, 291 NLRB 764, 771 (1988); *Redd-I, Inc.*, 290 NLRB 1115, 1125 (1988).

With respect to the element of a respondent's knowledge of the employee's union or other protected activities, the Board has held that where this element is not established by direct evidence, it can be established by circumstantial evidence or inferred from circumstances which, taken together, show that a respondent had knowledge of the activities. These circumstances may include the fact that a union campaign is underway, the openness of the employee's activities, the association of the employee with well-known union activists, the timing of the discrimination, disparate treatment of the employee, or a respondent's belief that an employee is an activist. *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995); *T. K. Harvin & Sons*, 316 NLRB 510, 527–528 (1995). Where a supervisor or manager possesses knowledge of an employee's activities, that knowledge may be imputed to the respondent. *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1143–1144 (1995); *Pellegrini Bros. Wines*, 239 NLRB 1220 fn. 2 (1979).

2. John Iace

(a) Respondent's knowledge of Iace's protected activities

Although Respondent claimed that Graettinger had no knowledge of Iace's union activities, I have not credited him on this point.[3] Iace's union activities were extensive and public, taking place in the parking lot, among other places. The prior district service manager, Medford, was well aware of Iace's leadership role in the Union, as shown by his speaking with Iace about issues the service technicians were concerned about in June 1997 and discussion of a "third party," obviously the Union. Medford was a high ranking manager, and his knowledge is properly imputed to Respondent. In addition, Iace mentioned the Union to Graettinger in their meeting on August 21. From all these circumstances, I find that Respondent did have knowledge of Iace's union activities.

In addition, Respondent admitted, through Graettinger, that it was aware of Iace's complaints regarding the pressure on all the service technicians to do more service calls, and the employees' dissatisfaction with Christine Smith's supervision.

(b) Respondent's animus

There are no allegations of any independent 8(a)(1) allegations in this case. The General Counsel argues that Respondent was unfriendly toward the Union, as evidenced by its opposition to the union campaign, certain remarks made to Iace by Managers Medford and Graettinger, and the circumstances of the discharges themselves. Respondent argues that there was insufficient proof of antiunion animus.

It is undisputed that Respondent did oppose the Union in the representation campaign, holding numerous meetings at which it presented arguments against representation. This conduct is entirely lawful, and I decline to base any findings of antiunion animus thereon.

There does exist, however, other evidence of Respondent's hostility to the Union and to the idea of its employees being represented by a union. Medford's remarks to Iace in June 1997 are one example. Medford told Iace that Respondent did not want a third party, i.e., the Union, at the service center. In addition, his questioning as to what steps Respondent might take in order to make the Union "go away" shows strong opposition to the Union. Within a couple of months, Graettinger also expressed strong unfriendliness to the Union and to Iace's union activities in his conversation with Iace in August 1997. Graettinger's characterization of Iace as a "troublemaker" is a classic covert expression of antiunion animus. As more fully described below, I also find evidence of antiunion animus in Graettinger's conduct in his determining to discharge the three employees and his method of doing so, as well as in his behavior to Hepburn after he had discharged her.

(c) Iace's discharge

The General Counsel argues that the timing of Iace's discharge, occurring within several weeks of Graettinger's arrival and direct knowledge of Iace's union and concerted activities, is one fact tending to show that the reason for the discharge was unlawful. Another factor relied on is the disparity in Iace's treatment when contrasted with other employees. Iace's work was subjected to unusually close scrutiny, and he was discharged ostensibly for infractions which were commonplace among service technicians. A third factor the General Counsel points to is the unusual way in which Respondent investigated the alleged infractions, i.e., the seeking of authority to discharge Iace before any investigation was undertaken, the complete noninvolvement of knowledgeable supervisors in the investigation, the failure of local supervision to seek, obtain, or permit any explanation from Iace, and the reliance on a theft investigator, largely ignorant of the service operation, for the only investigation undertaken.

Respondent, on the other hand, argues Iace was subject to closer scrutiny than other employees only because of his February 1997 discipline, and was discharged because he repeated

[3] Graettinger contradicted himself in testimony about his knowledge of the union campaign, first stating that he did not even know there was a campaign until January 1998, then later admitting that he was aware of the campaign at least as of September 1997, when a blank union authorization card was posted on a company bulletin board. Furthermore, Graettinger was assuming an important new job in August 1997, and it defies logic that he would not communicate with Medford, the outgoing manager, to discuss the operation he was taking over from Medford. Medford did not leave Respondent's employ, but simply moved to a different job. I specifically discredit Graettinger to the effect that he was unaware of the union activities of the Iace, Hepburn, or Richardson.

his errors of that time. Respondent's explanation for its unusual investigative method is less clear.

Based on the facts found and the arguments, I find that the General Counsel has made out a prima facie case. Respondent knew of Iace's activities, was not pleased with those activities, and discharged him. The timing of the discharge, the unusual and inadequate nature of the investigation, and the disparity in Respondent's treatment of Iace are all factors which support a finding of causation between Iace's protected activities and Respondent's treatment of him. Regarding the three "reasons" seized upon by Graettinger to justify Iace's discharge, they were shown by the evidence to be relatively common practice among the service technicians and not the cause of discipline to other service technicians. Graettinger and Christine Smith revealed their bias by repeatedly referring to Iace's sale of a maintenance agreement to a customer (one of the three reasons) as a "free" repair. In fact, not only were the service technicians encouraged to sell these agreements, but the cost of the maintenance agreement was by no means "free." Respondent's net income from that particular repair may have been more or less than the cost of the repair alone, but it was not a "free" repair, as Respondent's witnesses insisted on mischaracterizing it.

Regarding the investigation, Respondent advanced no convincing reason for using a professional theft investigator who knew little or nothing about the work of the service technicians to conduct an interview with Iace. Gonzalez would have no way of knowing, and in fact did not know, whether doing a service check on a second appliance was commonly done or not. Likewise, he was not knowledgeable about the admitted power of service technicians to change the warranty date on an appliance where appropriate. Graettinger admitted that he neither asked for nor heard any explanation or defense from Iace. Instead, as did the respondent in *Emergency One, Inc.*, supra, 306 NLRB at 308, he conducted an investigation designed not to find out what occurred, but rather to support the employee's discharge. The evidence shows Graettinger wanted to reach a predetermined result, not to investigate.

Respondent argues that even assuming a prima facie case, Respondent would have discharged Iace in any case, based on his continuation of conduct he had been warned about previously, and that his discharge is lawful under the *Wright Line* doctrine. Respondent had introduced no evidence of any other employee of comparable seniority, 31 years, who was fired for doing service checks on a second appliance, or for changing warranty dates, or selling a maintenance agreement. The evidence of allegedly consistent discharges on which Respondent relied, those employees interviewed by Investigator Gonzalez in the same time period, were discharged for garden variety theft, either of appliance parts or money. Respondent introduced no evidence of any kind of even minor discipline, much less discharge, for the same type of alleged infractions on the basis of which Iace was allegedly discharged. Except for cases of ordinary theft, and in the cases of Hepburn and Richardson, Respondent can point to no other employees who were interviewed by Gonzalez only, without any investigation by a service supervisor.

The evidence likewise shows that Iace did not repeat his transgression of February 1997, which consisted of recording as "complete" as service call that had been canceled before he had visited the location. The alleged transgressions on which Respondent relied in September and October 1997 were different, and were shown by testimony of neutral and credible witnesses to be common practices, rather than egregious sins against Respondent's policy. Respondent could point to no rules specifically prohibiting these practices. Even assuming that these practices technically violated a policy of Respondent's, they were not shown to be cause for discipline of any kind among other service technicians.

I find that the evidence does not prove that Respondent would have discharged Iace even in the absence of his protected activities.

3. Hepburn and Richardson

(a) Respondent's knowledge of Hepburn's and Richardson's union activities or sentiments

The fact that Hepburn made remarks at the mid-February 1998 meeting called by Respondent and addressed by Charlie Young which would be construed as critical of Respondent is sufficient to show that Respondent had notice of her prounion sentiments. While Respondent may not have had knowledge of the extent of her union activities, it is logical to infer, based on the widespread belief that she had authored the "anonymous" letter circulated that same month, that Respondent believed she was a union activist. In addition, the fact that she and Richardson were both assigned to attend the Respondent-called meeting at which all the employees were union supporters is also persuasive that Respondent knew they were both union supporters. Graettinger's reaction to Hepburn's mention of the Union after her discharge, his lack of any expression of surprise or any denial, and especially his smile, all support the finding that he was well aware of her union activities. The fact that a manager would smile at an employee whom he had just discharged and who was obviously very upset is inexplicable *unless* it is interpreted as a smile of triumph responding directly to Hepburn's remark that she was being fired because of the Union. I find that Graettinger's smile was, in fact, a response to Hepburn's accusation that she had been fired because of her union activities. I find, furthermore, that this reaction was an indication that not only was Graettinger well aware of Hepburn's union activities, but also that he was delighted with the accomplishment of his unlawful action.

With respect to Richardson, his attendance at the same meeting and his overt agreement with Hepburn's remarks there, are direct evidence that he was believed by Respondent to be a union supporter. Charlie Young's knowledge that Richardson supported the Union is imputed to Respondent. In addition, his well-known association with Joe Fowler is circumstantial evidence that Respondent believed him to be a union supporter. On this subject, the General Counsel has urged that the March 1997 surveillance of Fowler, Richardson, and others at the lunch hour was in fact surveillance of their union activities. While I find that evidence of the purpose of McLaughlin's binocular viewing of the lunch group is insufficient to find that he was surveying their union activities, I find it does establish he knew Richardson and Fowler, the main union activist, were associated together. This is circumstantial evidence which supports the inference that Respondent believed Richardson supported the Union, especially when viewed in conjunction with the other evidence tending to the same conclusion.

(b) The discharges

In undertaking the discharges of Hepburn and Richardson, the evidence shows Respondent pursued a similar course of action to its discharge of Iace. At the time of McLaughlin's

report to Graettinger of Richardson's coding of the refrigerator repair at Hepburn's house, it was less than 2 weeks before the election. Graettinger testified that he immediately determined that it looked like collusion between the two employees. He jumped to this conclusion before finding out if there was an explanation which was susceptible of a different interpretation, and in fact without any investigation at all. At the time, Graettinger had only a hazy grasp of the customer satisfaction policy and no knowledge at all of the propensity of certain GE refrigerators to burn out their compressors early. While Respondent argues that the timing of the discharges, just 7 days after the election, is indicative of a nonretaliatory motive, I disagree. A respondent's discharge of union activists after a representation election has many times been found by the Board to indicate a motive to discourage other employees from engaging in union activities in the future. See, e.g., *Allegheny Ludlum Corp.*, 320 NLRB 484, 497 (1996), enfd. 104 F.3d 1354 (D.C. Cir. 1997). As in that case, here Respondent discharged Hepburn and Richardson "as soon as Respondent could get rid of [them] without running the risk of [their] discharge[s] being made a reason to overturn the results of the election and face a rerun election." In the instant case, Hepburn and Richardson were discharged on the fifth work day after the election.

Graettinger's actions indicate that he had no interest in finding out if there was any explanation of the way the service call had been coded. He immediately sought permission to discharge these two long-term employees, and according to his testimony, received it conditional on the facts turning out to be as he suspected. He never found out if the facts supported his suppositions. He conducted no investigation of his own or by service supervisors. Instead, he again called Gonzalez, the theft investigator, to investigate an issue about which Gonzalez had no expertise. The calling on a theft expert to investigate the coding of a service call, about which Gonzalez admittedly knew nothing, is highly suspect, and justifies an inference that, as with Iace, Graettinger did not intend to find out the facts, but only to support the discharges of Hepburn and Richardson, which he had decided upon without any investigation. On the conclusion of the interview, Graettinger simply asked Hepburn and Richardson if they had written and signed the papers Gonzalez obtained from them, NOT whether the material on the papers was true. He terminated each of them immediately. As with Iace, this conduct was designed to reach a predetermined result, not to investigate in any real sense.

In addition, Graettinger's response to Hepburn's remark that she had been discharged because of the Union is indicative of a nexus between the discharge and her union activities. A discharge, the employment equivalent of capital punishment, is not an occasion of mirth. Graettinger's smile in response to Hepburn's remark was not only singularly inappropriate, but is probative of his unlawful motives. His lack of any expression of surprise or any attempt at denial would be ambiguous, but Graettinger removed any ambiguity by actually smiling at the misfortune of Hepburn. Graettinger's reaction tends to show that the real reason for the discharge was, in fact, the Union, as stated by Hepburn. As the asserted reason for the discharge of both employees was the same, it follows that all the evidence of unlawful motive applies to both discharges.

Respondent has defended by arguing that it would have discharged both employees regardless of any union activities because the repair of Hepburn's refrigerator violated its policies, and justified discharge. I reject Respondent's defense. Both employees were long-term employees with good employment records. There was no evidence that any employee had ever been disciplined, much less discharged, for applying, or even misapplying, the customer satisfaction policy. In fact, there was considerable evidence that service technicians were viewed as not using the policy often enough, and that they were encouraged to use it more. The repair done by Richardson was of the same type which was frequently covered by the customer satisfaction policy without comment of any kind from supervisors. There is direct evidence of disparity, as testified to without contradiction by former supervisor, Sandra Smith. She related that employee Adams, in 1995, had replaced a compressor worth approximately $500, and had erroneously not charged the customer. This employee was told by a supervisor to be more careful in the future, but was given no discipline beyond that. If, in fact, Richardson had misapplied the customer satisfaction policy, such an admonishment would have been consistent discipline. Respondent offered no evidence that any employee had ever been disciplined or discharged because of the customer satisfaction policy. There is, however, no evidence that Richardson violated the customer satisfaction policy. The approximately $500 or $600 value of the replacement compressor was well within the stated limits of the policy, whether the $5000 limit stated by the district service manager, or the $1000 believed by former Supervisor Reeves was actually in force. In the absence of evidence that there was a violation of the policy and that any such violation would be punishable by discharge without any prior warning, Respondent cannot sustain its defense.

For all the foregoing reasons, I find that Respondent discharged Corliss Hepburn and Cordy Richardson because of their union activities.

CONCLUSIONS OF LAW

1. By discharging John Iace, Corliss Hepburn, and Cordy Richardson, Respondent has violated Section 8(a)(1) and (3) of the Act.

2. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to reinstate John Iace, Corliss Hepburn, and Cordy Richardson to their former jobs, or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed. I shall also recommend that Respondent be ordered to remove from the employment records of John Iace, Corliss Hepburn, and Cordy Richardson any notations relating to the unlawful action taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Sears, Roebuck and Company, Plantation and west Palm Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in union or concerted activities protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer John Iace, Corliss Hepburn, and Cordy Richardson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make John Iace, Corliss Hepburn, and Cordy Richardson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth is the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of John Iace, Corliss Hepburn, and Cordy Richardson, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Plantation and West Palm Beach, Florida locations copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, deface, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. November 24, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate employees because of their union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Iace, Corliss Hepburn, and Cordy Richardson full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Iace, Corliss Hepburn, and Cordy Richardson whole for any loss of earnings and other interim benefits resulting from their terminations, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of John Iace, Corliss Hepburn, and Cordy Richardson, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

SEARS, ROEBUCK AND COMPANY

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."